U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REATHA WATTS and DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ATLANTA REGIONAL OFFICE, Atlanta, GA

Docket No. 02-1201; Submitted on the Record;
Issued January 27, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based upon her ability to perform the duties of the selected position of receptionist.

This is the second appeal before the Board. By decision dated November 28, 1990, the Board reversed the Office's decisions which terminated appellant's benefits.[1] The Board found that appellant had not refused an offer of suitable employment and thus, the Office erred in terminating her compensation benefits.[2] The law and the facts of the case, as set forth in the Board's prior decision, are incorporated by reference.[3]

The Office referred appellant for a second opinion examination. In a report dated November 2, 1999, Dr. Joseph I. Hoffman, Jr., a Board-certified orthopedic surgeon, concluded that appellant was capable of working eight hours a day with specified restrictions. Dr. Hoffman noted that appellant had "a functional though not optimal range of motion of the right knee" and that she had "a small degree of disability from her operation" which was expected. He concluded that appellant was capable of performing sedentary work, "specifically that of a secretary typist."

On December 15, 1999 the Office referred appellant for vocational rehabilitation which he completed. The rehabilitation counselor determined that the position of receptionist was within appellant's physical limitations and was available in suitable numbers to make it

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[1] Docket No. 90-517 (issued November 28, 1990).

[2] Appellant's claim was accepted for right gastronemius leg and lateral meniscus tear of the right knee. The Office authorized right knee arthroscopic surgery and total right knee replacement.

[3] Appellant elected to receive benefits under the Federal Employees' Compensation Act rather than retirement benefits.

reasonably available to appellant in her commuting area. The Office reviewed the position description and appellant's limitations as noted by Dr. Hoffman and determined that based on the employment injury appellant was capable of performing the duties of the position.

On October 13, 2000 the Office issued a notice of proposed reduction of benefits. The Office noted that Dr. Hugh C. McLeod, III, an attending Board-certified orthopedic surgeon, opined that she was capable of working four hours per day five days a week in a March 1993 report and Dr. Hoffman, the second opinion Board-certified orthopedic surgeon, concluded that she was capable of working eight hours a day. The Office found that the medical evidence of record established that the position of receptionist was suitable work.

On October 13, 2001 the Office advised appellant that it was reissuing the notice of proposed reduction of compensation.

Appellant responded by letter dated October 16, 2001 contesting the proposed reduction in compensation and enclosed a report from Dr. McLeod. In his October 12, 2001 report, Dr. McLeod indicated that he believed appellant was retired and was "somewhat puzzled as to the nature of the request" regarding appellant's work status. He opined that appellant was capable of working sedentary light-duty work and was limited to no standing or walking for more than 15 minutes.

On March 8, 2002 the Office reduced appellant's compensation based upon her ability to earn wages in the selected position of receptionist.

The Board finds that the Office properly reduced appellant's compensation based upon her ability to perform the duties of the selected position of receptionist.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5]

Section 8115(a) of the Act provides that an injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages, but who is not totally disabled for all gainful employment is entitled to compensation based on loss of wage-earning capacity.[6] The wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity.[7] If an employee has no actual

[4] *Gloria J. Godfrey*, 52 ECAB __ (Docket No. 00-502, issued August 27, 2001).

[5] *Lynda J. Olson*, 52 ECAB __ (Docket No. 00-2085, issued July 11, 2001); *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

[6] 5 U.S.C. § 8115(a); *see* 20 C.F.R. § 10.403.

[7] *Id.*

earnings, wage-earning capacity is determined with due regard to the nature of the injury; the degree of physical impairment; usual employment; age; qualifications for other employment; the availability of suitable employment; and other factors or circumstances, which may affect wage-earning capacity in the disabled condition.[8] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn wages and not on actual wages loss.[9] Further, a condition which develops following an employment injury and which is not a consequence of the employment injury is not to be considered in determining wage-earning capacity.[10]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[11] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[12] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

The medical evidence establishes that appellant is physically capable of performing the work of receptionist. Dr. Hoffman, a second opinion Board-certified orthopedic surgeon, concluded that appellant was capable of performing sedentary work, specifically that of a secretary typist in his November 2, 1999 report. On the basis of this report, the Office referred appellant to vocational rehabilitation.

Appellant disagreed with the Office's conclusion that she was capable of performing the position of receptionist and submitted an October 12, 2001 report by Dr. McLeod in which he noted that he thought appellant was retired and was "somewhat puzzled as to the nature of the request" regarding appellant's work status. However, regarding her physical capabilities, in his October 12, 2001 report, Dr. McLeod concluded that she was capable of performing sedentary light-duty work provided that she was not required to stand or walk for more than 15 minutes. Dr. McLeod's opinion does not support a determination that appellant could not perform the duties of a receptionist from the standpoint of her accepted employment injury and, in fact, is supportive of Dr. Hoffman's finding that she was capable of performing the duties of a receptionist.

[8] *Mary Jo Colvert*, 45 ECAB 575 (1994).

[9] *Billy R. Beasley*, 45 ECAB 244 (1993).

[10] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[11] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[12] *Dorothy Lams*, *supra* note 11; *Albert C. Shadrick*, *supra* note 5; *see also* 20 C.F.R. § 10.303.

Thus, the Board finds that appellant was capable of performing the duties of a receptionist as there is no contrary medical evidence of record. The Office properly reduced her compensation based upon her ability to earn wages in the selected position of receptionist.

The March 8, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member